

Office-Supreme Court, U. S.
FILED

JUN 20 1951

SUPREME COURT OF THE UNITED STATES

CLERK

OCTOBER TERM, 1950

No. 399

JACK H. BREARD,

Appellant,

vs.

CITY OF ALEXANDRIA

APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

APPELLEE'S ANSWER TO PETITION FOR
REHEARING

FRANK H. PETERMAN,
Counsel for Appellee.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 399

JACK H. BREARD,

Appellant,

vs.

CITY OF ALEXANDRIA,

Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

**APPELLEE'S ANSWER TO PETITION FOR A
REHEARING**

*To the Honorable the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

The limited time in which to prepare a response to appellant's petition for rehearing necessarily precludes us from a lengthy analysis of the erroneous arguments advanced in support thereof. It is an old strategy, and one which is sometimes effective, to put to the Court certain accepted principles of law and then ingeniously attempt to

work the facts of the case under discussion into the pattern of the cited jurisprudence. Such is the situation with respect to appellant's petition for rehearing.

This case was orally argued before the Court, it was briefed fully by both litigants, the Court gave the matter careful consideration for many weeks before reaching its conclusion, the issues were thoroughly analyzed and due consideration was given to the arguments advanced by appellant. The case having been explored in all its aspects and all of the contentions now presented in the motion for rehearing having been previously presented, there is nothing in appellant's application except a rehash in a different fashion of the arguments which have already been made. We feel it incumbent, however, to point out briefly why there is no merit in the petition for rehearing. We will take up the points presented in the petition for rehearing in the order in which they appear there.

1

Appellant contends that the decision of the majority misconceives the nature and effect of the ordinance. Counsel quotes from one of the dissenting opinions to the effect that "the ordinance is a flat prohibition of solicitation". This is patently incorrect. If the ordinance prohibited the selling of magazines and periodicals in the City of Alexandria or denied to anyone the right to solicit subscriptions in any form or manner it would be "a flat prohibition". The ordinance speaks for itself and its very language refutes the argument made on behalf of appellant. If we may go out of the record we would like to quote the following letter received by the Mayor of Alexandria from a housewife after news of the decision in this case had been published:

"Allow me to express my heartfelt appreciation to the City of Alexandria for the support given the ordi-

nance prohibiting door-to-door selling in Alexandria residential districts which the Supreme Court of the United States recently upheld. If you've never been kneading bread when the doorbell rang to ask if you'd like to buy a magazine—if you've never had someone in your family sleeping when someone pounded on the porch to sell a brush—if you've never been busy at the myriad chores of keeping house and been interrupted by salesmen, then you can hardly appreciate how much a law of this kind means. Were it not for this ordinance I'd have to be continually on the run, catching callers. While the salesmen may be courteous, I want to talk to them when I have time—not when I'm trying to cook dinner, take in the clothes, make preserves and answer the telephone."

As was well stated in the majority opinion the constitutionality of the ordinance depends upon a balancing of the conveniences by the householder's desire for privacy and "the publisher's right to distribute publications in the *precise way that those soliciting for him think brings the best results*".

Appellant says that "the permissive feature of the ordinance is merely a sop to allay constitutional objection and the ordinance in its practical operation and effect *bars all manner of solicitation on private premises*". Here again the statement of appellant is incorrect and is contradicted by the language of the ordinance which definitely does not "bar all manner of solicitation on private premises". An ordinance of this kind has been in effect in Alexandria since 1939 and there have been many, many instances of sales and solicitation of orders in private residences where the permission of the occupant was first obtained. The practice has proven satisfactory and acceptable to a substantial number of firms both local and foreign whose agents come to Alexandria annually. But appellant does not want to be regulated according to the wishes of the people of the City

as expressed in the ordinance adopted by their City Council. He wants to decide and determine the conditions under which he may invade the privacy of the home and annoy and disturb its occupants.

Regarding the permissive feature of the ordinance this has been misconstrued by appellant. Its purpose is to allow solicitation under certain conditions, not prevent it. The City of Alexandria could in our opinion have prohibited operations of itinerant solicitors in the residential area altogether and such a measure would have been constitutional. In *Murphy v. California*, 225 U. S. 623, 56 L. Ed. 1228, the Supreme Court passed upon an ordinance which *prohibited* any person from keeping any hall or room in which billiard or pool tables were kept for hire or public use but excepted billiard tables for the use of regular guests of a hotel. The defendant who violated this ordinance contended that it was repugnant to the Fourteenth Amendment in that it prevented him from maintaining a billiard hall and deprived him of the right to follow an occupation that was not a nuisance per se. He had gone to considerable expense in equipping and leasing a room in the City of South Pasadena, and he argued that not only was he put out of business but that there was nothing in his business which affected health, comfort, safety or morality. The Supreme Court of the United States declared that while the Fourteenth Amendment protects a citizen in his right to engage in any lawful business "it does not prevent legislation intended to regulate useful occupations which because of their nature or location may prove injurious or *offensive* to the public." In the present case the members of the City Council of Alexandria have presumably followed the wishes of their constituents and have adopted a measure which was intended to curb an activity that was *offensive*. As pointed out in our original brief the City Council in passing an ordinance

presumably represents the sentiment and the judgment of a majority of its citizens, and it is not the function of the judicial branch of the government to concern itself with the question of the desirability of a law. These principles are all discussed at length on Pages 6 to 20 of the original brief filed by appellee, where many cases are cited.

Appellant contends that the majority opinion is based upon an erroneous assumption as to the nature of appellant's business and the effect of the ordinance thereon. The argument made by appellant here is in all respects a rehash of what is contained in his original brief. We do not find in the record any evidence to support appellant's assertion that if Penal Ordinance No. 500 be applied to magazine subscription solicitation "the appellant and others similarly situated *are out of business* in all Green River Ordinance Towns and a substantial portion of the total circulation of American magazines and periodicals is placed in jeopardy". Even if this exaggerated statement were correct nevertheless we believe that the situation would be no different from that in *Murphy v. California* cited above. But the statement from appellant's brief, which we have quoted, does not conform to the stipulation of facts referred to by him. In this stipulation which was drawn by Counsel for appellant, and which we were willing to accept for the purposes of the trial of this case, it was agreed as follows:

"15. The itinerant solicitors of Keystone have a low price unit to sell (subscription prices range generally from \$2.00 to \$6.00 per year) and the present method of operation by Keystone and its itinerant solicitors is considered by them to be *the most effective and economical method*" (R: 10).

This statement of facts bears out the views expressed in the majority opinion to the effect that solicitors are con-

cerned with the most effective and economical method of doing business and that they desire to carry on their activities "in the *precise* way that those soliciting think brings the best results".

Appellant contends that the majority opinion fails to consider the interstate commerce feature. His brief repeats his previous argument concerning the drummer decisions where states or municipalities attempted to place a tax or license on interstate business. There is no tax or license fee required from interstate solicitors by the Alexandria ordinance and no difference is made between local and non-resident operators. Appellant mentions *Dean Milk Company v. City of Madison*, 340 U. S. 349, 95 L. Ed. 228. In that case an ordinance of the City of Madison made it unlawful to sell any milk as pasteurized unless it had been processed and bottled at an approved pasteurization plant within a radius of five miles from the central square of the city. The appellant was an Illinois corporation engaged in distributing milk and milk products in Illinois and Wisconsin. The Court set aside the ordinance, and said that the regulation in effect excluded from distribution in Madison wholesome milk produced and pasteurized in Illinois. In commenting upon this the opinion added: "In thus erecting an economic barrier protecting a major *local industry* against competition from without the state Madison plainly discriminates against interstate commerce."

It is perfectly clear that the decision in the *Dean Milk Company* case is not applicable to the facts in the present *Alexandria* case where the ordinance makes no distinction between local and foreign commerce, and does not place a barrier protecting *local industry* against competition from without the state. As we said in the beginning appellant cites decisions which are sound when applied to the facts

in the cases involved, then attempts to stretch their application to include situations that are not similar. The application for rehearing further says "the effect of the Green River Ordinance is to prevent the interstate competitor of the local retailer from selling his goods, wares or magazines in any community in which the Green River Ordinance is enforced". This statement is not supported by anything in the record, and as a matter of fact is not true. From this quoted statement appellant then draws this unwarranted conclusion "Unquestionably this is gross discrimination against interstate commerce".

Appellant contends that the decision violates the constitutional guarantee of freedom of the press. It is a far fetched and flimsy argument to say that a salesman selling magazines on a commission basis who is interested in obtaining the maximum amount of subscriptions so that he may collect the maximum amount of fees is to be placed in the same category with Thomas Paine, John Milton and Emile Zola. In those cases where this Court has set aside ordinances or statutes which violated the constitutional guarantee of freedom of speech or of the press it has been because there was a prohibition on the distribution of information necessary for the preservation of a free society. Such cases have concerned situations where persons were arrested and convicted for passing out circulars, or distributing pamphlets dealing with politics, religion or matters of a similar nature. The case of *Thelma Martin v. City of Struthers*, 319 U. S. 141, 87 L. Ed. 1313, on which appellant relies deals with a member of Jehovah's Witnesses who was distributing leaflets advertising a religious meeting. Another case which appellant depends on is that of *Grosjean v. American Press Company*, 297 U. S. 233, 80 L. Ed.

660. In our original brief we explained the facts in connection with the *Grosjean* case. A reading of that decision discloses that the purpose of the law under attack was to punish a number of newspapers for having criticized the state administration then in power. Justice Sutherland as the organ of the Court said that the tax was "a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guarantees". We quote the following from the decision which shows the basis upon which the Court reached its conclusion:

"The predominant purpose of the grant of immunity here invoked was to preserve an untrammelled press as a vital source of public information. The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. The tax here involved is bad *not because it takes money from the pockets of the appellees*. If that were all, a wholly different question would be presented." (Pages 668, 669).

Another case referred to by appellant is *Kovacs v. Cooper*, 336 U. S. 77, 93 L. Ed. 513. We quote the following excerpts from the decision which support appellee in its contentions here rather than appellant:

"The police power of a state extends beyond health, morals and safety; and comprehends the duty, within constitutional limitations, to protect the well-being and *tranquility of a community*." * * * (P. 520)

"The preferred position of freedom of speech in a society that cherishes liberty for all does not require

legislators to be insensible to claims by citizens *to comfort and convenience.*" * * *

"There is no restriction upon the communication of ideas or discussion of issues by the human voice, by newspapers, by pamphlets, by dodgers. We think that the need for *reasonable protection in the homes or business houses* from the distracting noises of vehicles equipped with such sound amplifying devices justifies the ordinance." (P. 523)

Conclusion

For the reasons set forth above it is respectfully urged that the petition for rehearing be denied.

Respectfully submitted,

FRANK H. PETERMAN,
909 Sixth Street,
Alexandria, Louisiana,
Attorney for Appellee.

(5657)